NO. 46359-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL JOE SEVERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 13-1-02077-9

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

Michael Joe Severson ("defendant") was charged with four counts of child molestation in the first degree on May 23, 2013. CP 1-3. Two of the counts related to victim J.C. CP 1-3. The other two counts related to victim K.C.-J. CP 1-3.

The case was called for trial on April 8, 2014. I RP 3. The trial court conducted a child hearsay hearing regarding statements made by K.C.-J. II RP 45-132. Based on some of the dates mentioned during the child hearsay hearing, the State filed an amended information expanding the charging period for the crimes on April 14, 2014. CP 17-19. The trial court determined that K.C.-J. was competent to testify and that her statements were admissible under ***State v. Ryan***, 103 Wn.2d 165, 691 P.2d 197 (1984). The trial court entered findings regarding the admissibility of the child hearsay statements. CP 20-22.

At trial, the State called K.C.-J., IV RP 152-1187, J.C., IV RP 194-244, Michelle Breland, IV RP 247-269, Thomas Campbell, IV RP 274-304, Keri Arnold, V RP 327-366, Shanna Carter Zander, V RP 368-441, Michael Thomas, V RP 449-484, and Det. Brent Eggleston, V RP 485-

495. Defendant testified in his own defense. V RP 500 - VI RP 633. Defendant also called Patrick Farthing. VI RP 635-642. The State recalled Detective Brent Eggleston in rebuttal. VI RP 659-684.

The jury convicted the defendant as charged. CP 23, 24, 25, 26. Defendant was sentenced to 180 months to life in prison on June 6, 2014. CP 57.

2. Facts

Shanna Carter Zander is the mother of J.C. and K.C.-J. V RP 370. J.C.'s date of birth is 12/07/01. V RP 371. K.C.-J.'s date of birth is 9/14/07. V RP 371. Carter and her daughters lived at an apartment complex in Washington. V RP 373.

Carter met defendant through a mutual friend and they became close friends. V RP 375. Carter was working the graveyard shift at a gas station and the defendant was basically homeless, so they came to an arrangement where he would stay the night while she was at work and then leave in the morning. V RP 375-376. Eventually, defendant moved into the apartment and began to contribute his Social Security payment to help pay bills. V RP 378.

During 2010-2011, all of them lived together in a one bedroom apartment, apartment No. 1. V RP 385. In October 2011, they moved into

apartment No. 6, a two bedroom apartment. V RP 385. Defendant slept on the couch, while the others slept in the bedrooms. V RP 386. At various times, other people stayed overnight in the apartment as well. V RP 388. One of these people was Thomas "Bill" Campbell. V RP 388, IV RP 275. Campbell began to sleep on another couch in the apartment in 2011 or 2012. IV RP 284.

Defendant helped out around the apartment, cooked and helped out with the kids. V RP 379. The girls would refer to defendant at Mikey or Grandpa. V RP 383.

Mike Thomas lived across the street from the apartment complex. V RP 393. Carter, the girls, and defendant were all friends with Thomas. V RP 394-395. Michael Thomas became good friends with defendant after moving into the apartment complex across the street. V RP 453. He also got to know Carter, J.C. and K.C.-J. well. V RP 455.

On one occasion, Thomas witnessed K.C.-J. hitting herself in the groin. V RP 456. He asked her why she was doing it and K.C.-J. said that defendant does it. V RP 456. She appeared to be mimicking male masturbation. V RP 457. After this episode, Thomas began watching defendant and the children closer. V RP 458. He noticed that defendant would rub K.C.-J. on her inner thigh when she sat on his lap. V RP 459. He also noted that defendant was possessive of the girls and constantly

wanted them with him. V RP 460. Thomas told Carter of his concerns. V RP 461. Thomas believed the defendant was "grooming" the girls. V RP 396.

After these concerns were raised, Carter spoke to J.C about the defendant. V RP 398. Carter next spoke to K.C.-J. V RP 401. K.C.-J. told Carter that the defendant kisses her and puts his tongue in her mouth and that he tried to touch her with his private parts. V RP 402. K.C.-J. said that the defendant rubbed her "no-no," her vaginal area. V RP 404. K.C.-J. said that defendant told her that they would all be homeless if she told. V RP 402. Carter called the police. V RP 402.

Bill Campbell lived in apartment No. 5 of the complex where Carter, the girls, and the defendant lived. IV RP 277. They all became good friends, especially after the group moved from apartment No. 1 into apartment No. 6. IV RP 280-281. He moved out of the complex, but returned and stayed on Carter's couch after his mother became ill. IV RP 283.

Campbell saw some concerning interactions between defendant and the girls. IV RP 290. Campbell witnessed defendant and J.C. on the couch hugging each other at about 1:00 a.m. one morning. IV RP 291. They were sitting like a boyfriend and girlfriend would. IV RP 291. Campbell also witnessed K.C.-J. sitting on top of the defendant, straddling

him, while they watched TV on two to three occasions. IV RP 292-293. Defendant also seemed to want to go into the bathroom to help the girls after a bath or after they went to the bathroom. IV RP 299.

K.C.-J. is in kindergarten. IV RP 154. She lived with her mom, her sister, and defendant, who slept on the couch. IV RP 157. Defendant did fun things with her, like playing video games and riding bikes. IV RP 159. Defendant also did a bad thing. IV RP 164. Defendant touched her in her private part. IV 165-166. He used his hands to touch her "no-no," where pee comes out. IV RP 166. K.C.-J. initially testified the touching happened once. IV RP 168. She later said it happened more than once, as in every couple of months. IV RP 173.

J.C. is in fifth grade. IV RP 197. She lived with her mom, her sister and the defendant. IV RP 199. While they were all living in apartment 6, defendant touched her privates. IV RP 207. The touching occurred in the living room, while they were on the couch. IV RP 207-208. He touched her more than five times in this manner. IV RP 210. Defendant also touched her after a shower on one occasion. IV RP 212. She did not tell her mom about these things because she was scared. IV RP 217.

On September 7, 2012, Child Interviewer Keri Arnold interviewed both J.C. and K.C.-J. V RP 342. J.C. was 10 years old. V RP 342. K.C.-

J. was 4 years old. V RP 342. Both interviews were recorded on a DVD and both DVDs were admitted and published at trial. V RP 344-345, V RP 346-347. Arnold conducted an exercise to discern if K.C.-J. could tell the difference between truth and lie. V RP 345, 349.

Michele Breland, a pediatric nurse practitioner employed by the Child Abuse Intervention Department of Mary Bridge Children's Hospital, conducted medical examinations of the girls after their forensic interviews. IV RP 247-273. J.C.'s genital exam was normal. IV RP 259. K.C.-J.'s exam was normal as well. IV RP 266.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT COMMIT ANY ERRORS THAT REQUIRE REVERSAL.

a. Defendant did not object to the trial court's determination that K.C.-J. was competent. Even if he had, the court's determination was correct and not an abuse of discretion.

i. Defendant waived his objection to K.C.-J.'s competency by failing to object at trial.

An appellate court generally will not consider a claimed error that was not raised in the trial court. *See* RAP 2.5(a). One exception to this rule is when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). To meet RAP 2.5(a) and raise an

error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Id.* at 935. The purpose of this rule is to allow the trial court the opportunity to consider all issues and arguments and correct any errors, in order that unnecessary appeals will be avoided. ***Smith v. Shannon***, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. The court has "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." ***Bellevue Sch. Dist. 405 v. Lee***, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Stevens***, 58 Wn. App. 478, 485-6, 794 P.2d 38 (1990); ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). If the specific basis for the objection at

trial is not the basis the defendant argues at the appellate level, then the defendant has lost their opportunity for review. ***Guloy*** at 422.

In ***State v. Cooley***, 48 Wn. App. 286, 738 P.2d 705 (1987), the Court determined that no manifest error occurred with regard to the finding of child competency because defendant was able to cross examine child witness and child interviewer. ***Cooley*** at 290-291.

Here, the trial court held a pretrial hearing regarding K.C.-J.'s out of court statements. K.C.-J. testified at this hearing. While defense counsel brought up competency, he did not contest K.C-J's competency or object to the trial court's ruling that she was competent. Defense counsel believed that she was competent:

> I think the issue would be competency of [K.C.-J.], and I don't have any specific objections to the finding that she is competent. I think she is certainly able to relate her memory and facts and answer questions, so I believe she is competent.

II RP 123. K. J.-C. also testified at trial. The Court should decline to hear this issue as defendant failed to object to K.C.-J.'s competency at trial and there is no manifest error regarding a constitutional right.

ii. Even if this issue were not waived, the trial court properly found K.C.-J. competent to testify and properly admitted her statements to others as child hearsay.

"[A]ll witnesses—children and adults alike—are presumed competent until proved otherwise by a preponderance of evidence." ***State v. Brousseau***, 172 Wn.2d 331, 341, 259 P.3d 209 (2011) (*citing* ***State v. S.J.W.***, 170 Wn.2d 92, 100, 239 P.3d 568 (2010)); ER 601 ("[e]very person is competent to be a witness except as otherwise provided by statute or by court rule.").

However, RCW 5.60.050 provides

> The following persons shall not be competent to testify:
> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
> (2) Those who appear incapable of receiving just impressions of the fact, respecting which they are examined, or of relating them truly.

"A party challenging the competency of a child witness has the burden of rebutting that presumption [of competence] with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly." ***S.J.W.***, 170 Wn.2d at 102. Hence, "a witness is not required to testify at a pretrial competency hearing absent a threshold showing of incompetency." ***Brousseau***, 172 Wn.2d at 344-45.

In ***State v. Allen***, 70 Wn.2d 690, 424 P.2d 1021 (1967), the Washington State Supreme Court set out a five-part test for determining whether a child witness is competent to testify in a criminal trial:

> [t]he true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Allen, 70 Wn.2d at 692. However, the mere "recitation of the ***Allen*** factors, without more, d[oes] not constitute a sufficient offer of incompetency." ***Brousseau***, 172 Wn.2d at 345.

The responsibility for determining a witness' competency rests with the trial court, who "saw the witness, noticed her manner and considered her capacity and intelligence." ***State v. Avila***, 78 Wn. App. 731, 735, 899 P.2d 11, 14 (1995)(*quoting* ***State v. Johnson***, 28 Wn. App. 459, 461, 624 P.2d 213 (1981)). The competency of a youthful witness is not easily reflected in a written record. ***State v. Sardinia***, 42 Wn. App. 533, 537, 713 P.2d 122 (1986). The court's decision on competency will be reversed only upon a showing of a manifest abuse of discretion[1].

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[1] The defendant indicates that the standard of review is de novo if the competency determination was made on documentary evidence rather than personal observation of the witness. ***Jenkins v. Snohomish Cnty. Pub. Util. Dist. No. 1***, 105 Wn.2d 99, 102-103, 713 P.2d 79 (1986). BOA 19. In ***Jenkins***, the child witness was unavailable for testimony and the competency determination was only based on a deposition. As K.J.C. testified before the trial court, ***Jenkins*** is inapplicable to the case as bar.

Allen, 70 Wn.2d at 692. That means that no reasonable person would take the view adopted by the trial court. ***State v. Huelett***, 92 Wn.2d 967, 603 P.2d 1258 (1979). "[T]he bar to competency is low." ***Brousseau***, 172 Wn.2d at 347.

If required, the competency hearing should be held outside the presence of the jury. ***State v. Clark***, 53 Wn. App. 120, 765 P.2d 916 (1988). Pursuant to ER 104(a) and ER 1101(c)(3), the evidence rules do not apply. There is "no reversible error where a child's testimony at trial showed that the child was competent, notwithstanding any failure to assess competency beforehand." ***Brousseau***, 172 Wn.2d at 350.

The competency determination may be made by asking the child general questions rather than questions regarding the specific offense. ***State v. Przybylski***, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). It is better to test against objective facts known to the court, rather than disputed facts and events in the case itself. *Id.* at 665. As long as the witness demonstrates the ability to accurately relate events that occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding those incidents as well. *Id.*

The fact that there may be inconsistencies and contradictions in a child's testimony goes only to the weight of a child's testimony, not to its admissibility. ***State v. Woodward***, 32 Wn. App. 204, 208, 646 P.2d 135

(1982). The child may still be found competent even where there are inconsistencies. ***State v. Stange***, 53 Wn. App. 638, 769 P.2d 873 (1989); ***State v. McKinney***, 50 Wn. App. 56, 747 P.2d 1113 (1987). Finally, a child's reluctance to testify about sexual abuse does not undermine the finding of competency. ***State v. Carlson***, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993). A child, like many adults, can be expected to have difficulty discussing sexual matters in the open.

If the child witness is competent for direct examination at trial, she will remain so even if she cannot answer questions under cross-examination. ***State v. Guerin***, 63 Wn. App. 117, 122-123, 816 P.2d 1249 (1991). In ***Guerin***, the child victim testified about her father touching her inside her underwear. She was also told she would get a spanking if she told. *Id.* The court held that those statements established her independent recollection of the crime and her inability to answer defense questions could be attributed to other factors. *Id.* at 123.

In the present case, the defendant argues that the court erred in finding K.C.-J. competent to testify because she gave two versions of the "truth" and because the inconsistencies in her testimony call into question her ability to form and recollect memory. Brief of Appellant 20. The record shows otherwise.

With respect to defendant's first argument about the "truth", the first ***Allen*** factor only requires that the child have "an understanding of the obligation to speak the truth on the witness stand[.]" ***Allen***, 70 Wn.2d at 692. Implicit in this requirement is the notion that the child has some understanding of what the truth is, but this does not mean that the child must be able to define "truth," or parse out the differences between truth and lie. *See, e.g.,* ***State v. Sims***, 4 Wn. App. 188, 480 P.2d 228, *review denied*, 79 Wn.2d 1002 (1971). "A child's inability to express an understanding of the meaning of truth does not affect his [or her] competency as long as he [or she] possesses a sufficient understanding of truth to insure his [or her] testimony is not the result of fabrication or imagination." ***Sims***, 4 Wn. App. at 190. Thus, a child may be competent to testify as long as that child has "expressed an understanding of the duty to speak the truth," even if that child "could [not] give a precise definition of the term." *Id.*

In this case, although there were discrepancies between K.C-J.'s description of what happened when she described it to the CAC interviewer and what she described in court, the record is clear the K.C.-J. demonstrated that she had a sufficient understanding of what the truth is, and how it differs from a lie "to insure [her] testimony [wa]s not the result of fabrication or imagination." ***Sims***, 4 Wn. App. at 190.

During the child hearsay pretrial hearing, the trial court began by inquiring if K.C.-J. knew the difference between the truth and a lie:

> THE COURT: I'm Judge Hickman. And I'm going to ask you to take an oath, which means that you're going to promise to tell the truth, the whole truth, and nothing but the truth. Do you know the difference between a lie and telling the truth?
> THE WITNESS: Uh-huh.
> THE COURT: Is that "yes"?
> THE WITNESS: Yes.

II RP 48.

The prosecutor also asked K.J.-C. about whether she knew the difference between the truth and a lie:

> Q. Has your mom ever talked with you about telling the truth versus telling a lie?
> A. No.
> Q. Do you know what's better, to tell the truth or better to tell a lie?
> A. Better to tell the truth.
> Q. Why is it better to tell the truth?
> A. Because you don't want to lie.
> Q. Why don't you want to lie?
> A. Because that's bad.
> Q. If you lie at home, do you get in trouble? A. (Nods head affirmatively.)
> Q. Remember, you have to say out loud.
> A. Yes.
> Q. What kinds of things -- what kind of punishment do you get?
> A. Stay in my room and do nothing.

II RP 54-55. This line of questioning about truth versus lies continued:

> Q. Now, you said your mom and dad brought you to court today. If I told you that Mickey Mouse brought you to court today, would I be telling you the truth or would I be telling you a lie?
> A. The truth.
> Q. Did Mickey Mouse bring you to court today?
> A. No.
> Q. So is it a truth or a lie?
> A. A lie.
> Q. If I said -- what color is your shirt right there?
> A. I would say black.
> Q. If I told you that your shirt was orange, not black, am I telling you the truth or am I telling you a lie?
> A. A lie.
> Q. Why is that a lie?
> A. Because my shirt is not orange. It's black.
> Q. Do you know why it's better to tell the truth than to tell a lie?
> A. So we don't get in trouble.
> Q. Do you know what a promise is?
> A. Yes, I do.
> Q. If I promise to do something, am I supposed to do that thing?
> A. Yes.
> Q. And so can you promise me that you're going to tell the truth today?
> A. Yes.

II RP 56-57

During this hearing, K.J.C.'s mother was also asked whether K.J.-C. knew the difference between the truth and a lie:

> Q. Have you ever sat down with [K.C.-J] and talked with her about the difference between a truth and a lie?
> A. Yes.
> Q. Do you punish her if you catch her lying?
> A. Yes.
> Q. How do you punish her?

A. I'll take things away. No games, no TV.
Q. Aside from typical kid stuff, is [K.C.-J.] typically a truthful person?
A. Yes.

II RP 75.

Before trial, the court briefly went through telling the truth with K.C.-J. again. III RP 150-151.

Both at the pretrial hearing and during trial, K.C.-J expressed "an understanding of the obligation to speak the truth on the witness stand[,]" ***Allen***, 70 Wn.2d at 692.

Defendant next argues that K.C.-J.'s inconsistency points to a lack of competency. While there were inconsistencies, the fact that there may be inconsistencies and contradictions in a child's testimony goes only to the weight of a child's testimony, not to its admissibility. ***State v. Woodward***, 32 Wn. App. 204, 208, 646 P.2d 135 (1982). The child may still be found competent even where there are inconsistencies. ***State v. Stange***, 53 Wn. App. 638, 769 P.2d 873 (1989); ***State v. McKinney***, 50 Wn. App. 56, 747 P.2d 1113 (1987).

Additionally, the question is not whether the child is consistent about details of the incident, but whether the child has the general mental capacity to receive an accurate impression of it and a memory sufficient to retain it:

> Thus, Division One of this Court has held that a trial court need not examine a child witness regarding the particular issues and facts of the case to determine competency. In

> fact,... a witness's memory and perception might be better tested against objective facts known to the court, rather than disputed facts and events in the case itself. So long as the witness demonstrates by her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding those incidents as well.

State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987).

In this case, K.C.-J. testified about currently being in kindergarten, II RP 53, about previously being in preschool, II RP 54, about where she currently lives, II RP 57-58, and about where she previously lived when she lived with defendant, including other people who lived with them, II RP 59-61. Therefore, K.C.-J. "demonstrate[d] by her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue." and the court could have properly "infer[red] that [she] is likewise competent to testify regarding those incidents [at issue] as well." ***Przybylski***, 48 Wn. App. at 665.

All five ***Allen*** factors were satisfied. Because they were, the trial court did not abuse its discretion in finding K.C.-J. competent to testify, *see* ***Allen***, 70 Wn.2d at 692, and its decision to do so should be affirmed.

b. Defendant did not object to the trial court's determination that K.C.-J.'s out of court statements were admissible. Even if he had, the court's determination was correct and not an abuse of discretion.

i. Defendant waived his objection to K.C.-J.'s out of court statements by failing to object at trial.

As argued above, an appellate court generally will not consider a claimed error that was not raised in the trial court. *See* RAP 2.5(a). In ***State v. Fisher***, 43 Wn. App. 75, 715 P.2d 530, *reversed on other grounds*, 108 Wn.2d 419, 739 P.2d 683 (1987), the Court determined that because no objection was raised to the child hearsay in the trial court, and because no manifest constitutional right was involved as the child also testified, the issue was not preserved for appeal. ***Fisher***, at 78-79, 715 P.2d 530. *See also* ***State v. Leavitt***, 49 Wn. App. 348, 743 P.2d 270 (1987).

Here, the trial court held a pretrial hearing regarding child hearsay. K.C.-J. testified and this hearing. With regard to child hearsay, defense counsel explained:

> I'm going to be frank with the Court. I would just ask the Court to go through the ***Ryan*** factors. I don't have any specific arguments that these statements should not be admitted. I think the Court can go through the analysis of these factors and just make a record, but I don't have any specific objections.

II RP 122. K.C.-J. also testified at trial. The Court should decline to hear this issue as K.C.-J. was subject to cross examination on two occasions and defendant did not object to any of her out of court statements during trial.

ii. Even if this issue were not waived, the trial court properly admitted K.C.-J's out of court statements.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); ***State v. Rehak***, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***Rehak***, 67 Wn. App. at 162.

RCW 9A.44.120, commonly referred to as the "child hearsay statute," provides for the admission of out-of-court statements of a child victim of sexual abuse under certain circumstances. Essentially, the child hearsay statute requires a trial court to answer three questions in making its determination of the admissibility of child hearsay statements: (1) is the child victim's statement reliable; (2) is the child available to testify; and (3) if the child is unavailable, is there corroborative evidence of the act.

The child hearsay statute requires the court to hold a pre-trial hearing in which it determines the admissibility of a child victim's statements. During that hearing, the court must first determine if the statement being offered is reliable. That determination is based on a set of reliability factors approved by the Washington Supreme Court in ***State v. Ryan***, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984):

1. Whether the child has an apparent motive to lie;
2. The general character of the declarant, including veracity;
3. Whether more than one person heard the statements;
4. Whether the statements were made spontaneously;
5. Timing of declaration and relationship between declarant and witness;
6. Whether the statement contains express assertions about past facts;
7. Whether cross-examination could show the declarant's lack of knowledge;
8. Is there only a remote possibility the declarant's recollection is faulty; and
9. The overall circumstances surrounding the statement.

Ryan, 103 Wn.2d at 175-76 (taking the first five of those factors from ***State v. Parris***, 98 Wn.2d 140, 654 P.2d 77 (1982), and the last four from ***Dutton v. Evans***, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)).

In the years since the ***Ryan*** case was decided, two of the factors have been eliminated from consideration in the context of child hearsay. Factor six about assertions of past facts does not apply to child hearsay

statements because every statement a child makes concerning sexual abuse will be a statement relating a past fact. *See* ***State v. Leavitt***, 111 Wn.2d 66, 75, 758 P.2d 982 (1988); ***State v. Stange***, 53 Wn. App. 638, 769 P.2d 873, *review denied*, 113 Wn.2d 1007 (1989). Factor seven concerning cross-examination also does not apply to child hearsay statements because "cross-examination could in every case possibly show error in the child hearsay statement." ***Stange***, 53 Wn. App. at 647. *See also* ***Idaho v. Wright***, 497 U.S. 805, 820-824, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

Defendant now argues on appeal that K.C.-J.'s statements to her mother and the CAC interviewer were not reliable. Brief of Appellant 23. However, not every ***Ryan*** factor must be met before a statement is reliable. "[I]t is clear that not every factor listed in ***Ryan*** needs to be satisfied before a court will find a child's hearsay statement reliable under the child victim hearsay statute." *See* ***Swan***, *supra* at 652. Hence, there is no "magic number" of the remaining seven factors that must be present before the court finds the child's statements are reliable. The court must only find the factors have been "substantially met." *See, e.g.*, ***State v. McKinney***, 50 Wn. App. 56, 61-62, 747 P.2d 1113 (1987).

Here, the trial court made a complete finding regarding the admissibility of the child hearsay statements after arguments by the State

and defense. The trial court went through each of the ***Ryan*** factors and found that each of them was met. II RP 130-132. The trial court ruled that the statements K.C.-J. made to Shanna Carter-Zanders, Michael Thomas and Keri Arnold were all admissible. II RP 132, CP 20-22. Defense counsel did not object to the court's findings. II RP 127-128. The court did not abuse its discretion in admitting the child hearsay statements as the ***Ryan*** factors were substantially met.

Defendant also argues that K.C.-J.'s statement to Michael Thomas that "Mikey does it" falls outside of the child hearsay because this does not describe molestation or attempted molestation. Brief of Appellant, 33. However, K.C.-J.'s statement is ambiguous. Michael Thomas testified that K.C.-J. was hitting herself in the crotch. II RP 97. Thomas believed it mimicked male masturbation, but that is only his interpretation. Another interpretation is that defendant actually touched K.C.-J.'s vagina and this was K.C.-J.'s exaggerated way of acting this out in front of Thomas. Another interpretation is that defendant was masturbating during some of this incidents while he was molesting K.C.-J, which would be admissible as it shows his purpose was for sexual gratification. This hearsay statement was properly admitted by the trial court.

c. The trial court did not error in permitting rebuttal testimony about defendant's interview with law enforcement.

i. **Defendant objected to this evidence on relevance grounds, not as profile testimony, and therefore, this issue is not properly raised.**

"A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985). If the specific objection made at trial is not the basis the defendants are arguing on appeal, "they have lost their opportunity for review." *Id.*

Here, defendant attempts to characterize this argument as an error relating to "profile testimony." Brief of Appellant, 34-38. However, the specific objection made by defendant was relevancy:

> Your Honor, I'm going to object to this line of questioning. We are -- the purpose for this rebuttal is to prove statements were inconsistent with what [defendant] testified to on the stand. This background information is not part of that. It is not relevant, and I ask that it be excluded.

IV RP 664-665.

The State responded to this objection and the trial court ruled that he would only allow a bit more on the topic. IV RP 665. As defendant did not make any objection regarding profiling evidence, the argument was not properly preserved and the Court should not review it on appeal.

Had defendant objected as profile testimony, the parties could have made a proper record on the issue.

The other answer by Detective Eggleston that defendant finds fault with about interviewing individuals being investigating for sexually abusing children was not objected to at all. Brief of Appellant, 36; IV RP 684. Again, this argument was not properly preserved for appeal.

ii. Even if this issue were not waived, this line of questioning was improper as it was relevant to explain the procedure of defendant's interview.

"The trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision whether to admit or exclude evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion." ***State v. Demery***, 144 Wn.2d 753, 758, 30 P.3d 1278, 1281 (2001). A detective's testimony as to the protocol utilized in an interview only provides context for the interview and is not an improper comment on the truthfulness of a witness. ***State v. Kirkman***, 159 Wn.2d 918, 934, 155 P.3d 125 (2007).

Detective Eggleston's testimony was not profile evidence – it was evidence to provide context about defendant's interview. The questioning at issue was about how Detective Eggleston uses an interview technique to bring up that the inappropriate touching of a child is an accident as

opposed to an intentional act. IV RP 664-665. Detective Eggleston then explained how defendant eventually admitted to accidental contact. IV RP 666-667. On redirect, the questioning was again about how defendant's answers changed over time. IV RP 684-685.

Detective Eggleston's answers are similar to the officer's statements in ***State v. Demery***, 144 Wn.2d 753, 30 P.3d 753 (2001)(An officer accusing the defendant of lying during an interview does not constitute impermissible opinion testimony) and ***State v. Notaro***, 161 Wn. App.654, 668-670, 255 P.3d 774 (2011)(Detective's trial testimony describe the police interrogation strategy and helped explain to the jury why defendant changed some parts of his story – but not others – halfway through the interview). This was not profiling testimony and the trial court did abuse its discretion by allowing this line of questioning.

The trial court did not commit any errors in this trial that require reversal of defendant's convictions. Defendant did not object to any of these issues, and even if he had, the trial court properly used its discretion in its rulings. The Court should uphold defendant's convictions.

2. THE DEPUTY PROSECUTING ATTORNEY DID NOT COMMIT ERROR[2] IN TRIAL OR CLOSING ARGUMENT.

A defendant claiming prosecutorial error bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), *citing* ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A defendant can establish prejudice only if there is a substantial likelihood that the error affected the jury's verdict. ***State v. Carver***, 122 Wn.2d 300, 306, 93 P.3d 947 (2004). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by*, ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002); *see* ***State v. Warren***, 165 Wn.2d 17, 195 P.3d 940

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[2] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.,* ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase prosecutorial error." The State urges this Court to use the same phrase in its opinions.

(2008). Juries are presumed to follow the court's instructions. ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994). "[R]emarks must be read in context." ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); ***State v. Larios-Lopez***, 156 Wn. App. 257, 261, 233 P.3d 899 (2010). The Court's focus is less on what the prosecutor said; but rather on the effect which was likely to flow from the remarks. *See* ***State v. Emery***, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.*, *quoting* ***Slattery v. City of Seattle***, 169 Wash. 144, 148, 13 P.2d 464 (1932). *See also* ***Smith v. Phillips***, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); ***State v. Davenport***, 100 Wn.2d 757, 675 P.2d 1213 (1984); ***State v. Weber***, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983).

Where defense counsel objected to a prosecutor's remarks at trial, the trial court's rulings are reviewed for abuse of discretion. ***State v. Gregory***, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006). Even where there was a proper objection, an appellant claiming prosecutorial error "bears

the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). *See* ***State v. Thorgerson***, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); ***State v. Fisher***, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); ***State v. McKenzie***, 157 Wn.2d 44, 134 P.3d 221 (2006) (*quoting* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's error was so flagrant and ill -intentioned that an instruction could not have cured the resulting prejudice. ***Emery***, 174 Wn.2d at 761. Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Id.*, *quoting* ***State v. Thorgerson***, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)(emphasis in original).

In addition to the general principal of issue preservation, it is important for trial counsel to object to improper argument. Timely objections serve to discourage a prosecutor from escalating improper

comments on a topic or theme that has been rejected by the court. *See, e.g.,* ***State v. Warren,*** 165 Wn.2d 17, 195 P.3d 940 (2008). Proper objections may stop repetitive or continuing improper questions or argument in trial. *See e.g.,* ***State v. McKenzie***, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). A timely objection gives the trial court the opportunity to instruct the jury or otherwise cure the error, insuring a fair trial and avoiding a costly retrial. *See, e.g.,* ***Warren***, 165 Wn.2d at 25. The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See* ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). In other words, the best time and place to address an improper argument is in the trial court, where the court can take remedial action.

"The State is generally afforded wide latitude in making arguments to the jury, and prosecutors are allowed to draw reasonable inferences from the evidence." ***Anderson***, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not error for a prosecutor to argue that the evidence does not support a defense theory, ***State v. Russell***, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), ***State v. Contreras***, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied,* 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." ***Russell***, 125 Wn.2d at 87.

In the present case, defendant argues that the deputy prosecutor committed error in three ways. As argued below, the record shows otherwise.

a. The state did not solicit improper opinion testimony.

"It may be that in many cases it is impossible for a witness to testify in terms of pure fact; testimony inherently involves a 'thinking out into language', the transformation of thought to word, and the thought process involves much more than mere recording of fact." ***State v. Wigley***, 5 Wn. App. 465, 467, 488 P.2d 766, 768 (1971). "It is proper for a lay witness, in relating his observations, to testify in terms which include inferences and to state all relevant inferences, whether or not they embrace ultimate issues to be decided by the trier of fact, unless the trial judge, exercising judicial discretion, determines that drawing such inferences require special skill or knowledge or would tend to mislead the jury." *Id.* at 468.

Defendant argues that the State solicited improper opinion testimony from Bill Campbell and Mike Thomas, but this was not the case. Brief of Appellant 39. The State asked Bill Campbell about what he *observed* between defendant and the victims, not about his opinions. IV RP 290-291. Campbell then described observing defendant and J.C.

sitting together on the couch at 1:00 a.m. like a boyfriend and girlfriend. IV RP 291. The State asked if the way they were sitting made him look again. IV RP 291. Campbell replied, "Yeah. That -- kind of concerning and kind of creeped out about it." IV RP 291.

Campbell next described another observation where he witnessed K.C.-J. straddling defendant while they were on the couch together watching TV. IV RP 292-293. In asking why this sitting arrangement bothered Campbell, Campbell replied

> Because – I don't know. Because he – it just – I don't know. The hair stood up on my neck, and it just bothered me. I won't even lay with my own kid like that. Not that it's inappropriate, but in my opinion, it was inappropriate.

IV RP 293-294. The State was not asking this witness to give an opinion about the credibility of a witness, but to explain to the jury how and why he believed that defendant's interactions with J.C. and K.C.-J. went beyond innocent touching.

Defendant also argues that the State elicited opinion testimony from Mike Thomas. Again, the State did not ask for opinion testimony. The State asked Thomas to "describe the defendant's interactions with the girls." V RP 460. Thomas described how defendant became possessive of J.C. and K.C.-J. V RP 460-461.

There were then some questions about the adults talking about the alleged abuse in front of the children and the concept of suggestibility. V RP 464-469. This topic was followed up by defense counsel during cross examination. V RP 478-481. The State then asked on re-direct about how the girls would be upset about the mention of defendant's name. V RP 481. The State did use the term "abuse," but defense counsel clarified on re-cross that the witness did not use the words abuse or others and instead used general words. V RP 482-483.

First, defendant did not object to any of these questions as posed by the State or to the answers given by Bill Campbell or Mike Thomas. Defendant does not show that any of these alleged improper opinions resulted in prejudice that affected the jury verdict or that a curative instruction would not have corrected the problem. Defense could have objected that certain of the above questions were argumentative and the Court would have instructed the prosecutor to simply rephrase them if the Court believed they were improper. However, this did not occur, which likely meant that defense counsel did not believe they were improper questions or answers.

Second, neither of these witness offered a legal conclusion based on their opinion as was held improper in ***State v. Olmedo***, 112 Wn. App. 525, 49 P.3d 960 (2002). The two witnesses described interactions

between J.C. and K.C.-J. and defendant. These questions and answers were observations by Campbell and Thomas that eventually culminated in them telling the victim's mother about the possibility of child molestation. This was relevant evidence, not improper opinions of defendant's guilt. Additionally, this was not improper opinion as held improper in ***State v. Jungers***, 125 Wn. App. 895, 106 P.3d 827 (2005), where the prosecutor specifically asked an officer whether he believed the defendant and then argued this opinion in closing. *Id.* at 902-903. In this case, the State was not eliciting the witness's opinion about defendant's guilt, only their observations of how he acted with J.C. and K.C.-J.

These witnesses were merely giving their observations, which include inferences, based on what they saw of defendant's interactions with the girls. This is proper testimony under ***Wigley***, 5 Wn. App. at 468.

b. The state did not commit error by using the term "grooming."

The trial court made a pretrial ruling about using the term "grooming" only regarding a conversation between the Mike Thomas and Shanna Carter Zanders. I RP 26. The term did come out during the testimony Shanna Carter Zanders:

> Q. Could you please explain the circumstances that led to you calling 911?

A. I had a conversation with Mike [Thomas], and he told me that it looked like [defendant] was grooming my children.
Q. Did you know what grooming meant?
A. I had no clue.
Q. Did you ask him what it meant?
A. Yes, I did.
Q. And after he explained to you what he meant by it, what did you do?
A. I sat and talked with him a little bit more and --

V RP 396.

The State also asked Mike Thomas whether he had any concern over grooming. V RP 458.

During closing argument the prosecutor used the term "groom" three times. The first was referring to Mike Thomas telling Shanna Carter Zanders the defendant was grooming them. VII RP 712. The second again refers to the testimony of Mike Thomas. VII RP 723. In both of these instances the prosecutor is making an argument about the testimony adduced at trial. The third instance is in rebuttal when the prosecutor is talking about how the girls lay on top of the defendant. VII RP 743. This is in response to the defense argument that it was not logical for defendant to molest the girls while there are other people in the house.

Defendant did not object to the use of the term "grooming" during testimony or the prosecutor's closing argument. No witness ever defined what "grooming" means in the clinical sense. There was no expert

witness to give an actual definition of it as it relates to the child molestation. This case is distinguishable from ***State v. Braham***, 67 Wn. App. 930, 841 P.2d 785 (1992), where there was expert testimony about the grooming process.

The prosecutor did not violate the trial court's ruling and limited the amount of times "grooming" was used. Even if the prosecutor violated the trial court's pretrial order regarding the use of the term "grooming," defendant still must prove that the error likely affected the jury's verdict. *See* ***State v. Weber***, 159 Wn.2d 252, 149 P.3d 646 (2006). In this case, defendant failed to object to the error, request a curative instruction or move for a mistrial based on the prosecutor's use of the term in questioning or during closing argument.

This case is similar to ***State v. Edvalds***, 157 Wn. App. 517, 237 P.3d 368 (2010), where although the prosecutor used the term "surveillance" in violation of a pretrial motion, the Court determined that Edvalds failed to prove that it constituted error. However, in ***Edvalds***, defendant had actually objected to the term, where here, defendant failed to object at any time.

c. The state did not err during closing argument.

Prosecutors may, and usually do, argue inferences from the evidence, and witness credibility. This is not improper. *See* ***State v. Warren***, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). A prosecutor may also argue the jury instructions but may not misstate the law. ***State v. Allen***, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). While it would be improper for a prosecutor to argue a personal opinion about the credibility of a witness, a prosecutor "may freely comment on witness credibility based on the evidence." ***State v. Lewis***, 156 Wn. App.230, 240, 233 P.3d 891 (2010), *citing* ***State v. Gregory***, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). A prosecutor is permitted wide latitude to argue the facts in evidence, draw reasonable inferences from the evidence, and express those inferences to the jury. ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *citing* ***State v. Hoffman***, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998), and ***State v. Fiallo–Lopez***, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).

In the case at bar, defendant did not object to any of the prosecutor's arguments that are now complained of on appeal, probably because they were proper arguments. As such, it is not "flagrant or ill-intentioned." The State was arguing in the context of, and referring to, the

instructions and the evidence adduced at trial. If defendant thought that the prosecutor was straying from the instructions, he could have asked the court to remind or re-instruct the jury. *See* ***Warren***, *supra.*

Defendant reiterates his allegation that Bill Campbell and Mike Thomas gave improper witness opinions of defendant's guilt. Brief of Appellant 45. However, as discussed above, this evidence was properly admitted. As it was admitted, the prosecutor is allowed to argue inferences based on this evidence. There was no improper argument made by the State in closing based on this admitted evidence.

In addition, defendant argues that the prosecutor made a reference to uncharged crimes during closing argument. The State argued that, "And you probably haven't even heard everything the defendant did because it is a process." VII RP 699. This statement is distinguishable from the prosecutor's argument in ***State v. Boehning***, 127 Wn. App. 511, 111 P.3d 899 (2005), where the Court held it improper for the prosecutor to argue that a child's disclosures to witnesses which, were inadmissible at trial, were consistent with child's testimony and drew attention to the fact the prior disclosures would have supported dismissed rape charges. *Id.* at 521. The prosecutor made no mention of concrete disclosures to other parties or uncharged crimes. The prosecutor made an argument based on

the testimony of the child interviewer that sexual abuse is not simply "a moment in time" that simply ends after disclosure. VII RP 699.

Even assuming that defendant could show that the above arguments are improper, he has not shown that he was actually and substantially prejudiced by them. This was not the word of only one child against the word of the defendant. Both J.C. and K.C.-J. testified that the defendant molested them on separate occasions. And although he minimized and changed his story from his interview with Detective Eggleston and his testimony, defendant himself admitted to touching the girls in their vaginal area over their clothing during rough housing. V RP 538. Defendant also indicated that it was possible he touched their vaginal areas when his knees buckled and he fell on occasion. V RP 540.

These alleged errors do not rise to the level of cumulative error that warrants a new trial. "The doctrine of cumulative error does not apply where the errors are few and little or no effect on the outcome of the trial." ***State v. Weber***, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), citing ***State v. Greiff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Defendant has not shown that any of these alleged errors affected the outcome of the trial.

As defendant did not object to any of these alleged instances of prosecutorial error, defendant cannot show that any of the above alleged errors were prejudicial, nor that a curative instruction would not have

corrected the prejudicial effect on the jury. The Court should dismiss defendant's appeal and uphold his convictions.

3. DEFENSE COUNSEL WAS AN EFFECTIVE ADVOCATE.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of

demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for ineffective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). In fact:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable error – the kind of testing environed by the Sixth Amendment has occurred.

State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004), *quoting* ***U.S. v. Cronic***, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed 657 (1984).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489.

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

a. Defense counsel's performance was not deficient.

i. Defense counsel was not ineffective for not objecting to the trial court's determination that K.C.-J. was competent.

Failure to request a competency hearing is not ineffective assistance of counsel unless the defendant can make an affirmative

showing that the trial court would likely have found the witness incompetent. ***State v. Johnson***, 143 Wn. App. 1, 18, 177 P.3d 1127 (2007). The threshold for witness competency is very low. *Id.*

Defendant alleges that defense counsel was ineffective for failing to object to K.C.-J.'s competency. Brief of appellant 50. In this case, defense counsel raised the issue to the trial court, but reasonably concluded that he did not have a basis to object to K.C.-J.'s competency. II RP 129. He believed the trial court would rule that she was competent. II RP 127. As argued above, the trial court properly concluded that K.C.-J. was competent. II RP 130. Defendant cannot show that the trial court would likely have found K.C.-J. incompetent but for his counsel's failure to object. Thus, defense counsel was not ineffective in failing to object.

ii. Defense counsel was not ineffective for not objecting to K.C.-J.'s child hearsay statements.

"To prove that failure to object rendered counsel ineffective, [defendant] must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Defendant argues that his counsel was ineffective for failing to object to K.C.-J's child hearsay statements. Brief of appellant 51. Similar

to the above argument on K.C.-J's competency, defense counsel had no reasonable objection to the trial court finding K.C.-J.'s out of court statements as admissible as child hearsay. Defense counsel clearly thought about the issue, commenting about how he wants to make sure the "Court of Appeals knows I'm considering these issues and doing my job for [defendant]..." II RP 127-128. The trial court properly concluded these statements were admissible as child hearsay under ***Ryan***. Defendant cannot show that the trial court would have ruled these statement inadmissible but for his counsel's failure to object. Defense counsel was not ineffective for failing to contest these statements.

iii. Defense counsel was not ineffective for failing to object to K.C.-J.'s taped statement about what happened on her bicycle.

"The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662, 667 (1989).

Defendant submits that defense counsel was ineffective for failing to object to a portion of K.C.-J.'s videotaped interview where she talks about an incident on her bicycle involving the defendant[3]. Brief of

[3] Exhibit 1, 11:51-11:54.

Appellant 52. Neither the prosecutor nor defense brought up the incident in the questioning of any of the witnesses or in closing arguments. This testimony was not central to the case. As this incident was not mentioned by anyone other than K.C.-J. in her taped interview, defense counsel likely thought it was inconsequential to this case, or even that it helped show how K.C.-J. was a young child prone to exaggeration of events. Defense counsel was not ineffective for deciding not to object to this portion of the video being admitted.

iv. Defense counsel was not ineffective for not objecting to evidence that he ultimately used in his closing argument.

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489.

Defendant argues that defense counsel was ineffective for allowing the child interviewer to testify that J.K. disclosed witnessing defendant molest her sister. Brief of Appellant 55. Defendant argues there is no tactical reason to do his; however, defense counsel specifically brought this point up in his closing as he argued that the J.K.'s testimony was inconsistent with her prior statement and was therefore not credible. VII RP 736-737. It appears that defense counsel allowed this testimony to

show yet another example of how the girls' testimony was inconsistent. This was a strategic, tactical decision.

v. Defense counsel was not ineffective for failing to object to properly admissible testimony.

As argued above, defendant is incorrect that Bill Campbell or Mike Thomas gave improper opinion credibility evidence as to defendant's guilt. The testimony of Shanna Carter that people did not like how defendant spoke to her children is similar to this testimony. This is not an opinion about the guilt of the defendant. It likely could have been objected to as hearsay, but it really has nothing to do with the case and actually helps the defense theory that defendant was more of a parent to these children and the children could me making this false allegation for attention. RP 730-731.

Defendant also argues that defense counsel harmed him through his cross examination of Detective Eggleston. Brief of Appellant 58. Defendant takes defense counsel's argument out of context. The point defense counsel was making was about the length of the interrogation and whether defendant changed his answers to make the interrogation end. VI RP 678-679. Defense asked multiple time if people being interrogated eventually give the answer that the interrogator wants to hear. VI RP 679, 681. Defense then goes through how Detective Eggleston had interviewed Bill Campbell and Mike Thomas and watched the girls' forensic

interviews and now he "wanted to get a confession of [defendant]." VI RP 681. Defense again asks about how the detective is after a confession and that is what his goal is in the interview of defendant. VI RP 683. Defense ends pointing out that Detective Eggleston interrogated defendant for three hours and revisited the same themes again and again. VI RP 683. The point of these questions was not to offer an opinion that his client was guilty, but to show the jury that defendant's answers changed because the interview was lengthy and defendant just said what he did to make the interrogation end. This was not improper opinion of guilt, but a tactical decision. Defense counsel was not ineffective in asking these questions on cross examination.

vi. Defense counsel was not ineffective for not impeaching Carter with prior crimes of dishonesty.

Defendant argues that counsel was ineffective for not impeaching Shanna Carter with prior crimes of dishonesty. Brief of Appellant 61. First, the record provided by defendant leaves off an important sentence in counsel's argument. Counsel says, "I think at this point, Your Honor, I don't see any crimes that are admissible under 609. *I'll do a little research* between now and --" I RP 19 (emphasis added). Defense counsel did not concede, but said he needed to look at the issue. Both counsel were looking at the convictions and working though the argument on the record. It does appear from the record that both counsel were

reading ER 609 incorrectly, but there is nothing in the record to suggest that defense counsel did not in fact go back to his office and research the issue fully.

It is entirely possible that defense counsel made a tactical decision not to bring these convictions up because he determined that he had enough to impeach the Shanna Carter Zander. His closing points out that she was using methadone and working nights and sleeping all day. VII RP 728. He accuses her of being a neglectful parent. VII RP 730. A misdemeanor theft charge from 2008 and a potential crime involving falsification of insurance – which is undeveloped on the record – do not really make her less credible to the jury. Defense was able to attack her credibility without bringing these convictions into his cross examination.

vii. Defense counsel was not ineffective for failing to object to alleged prosecutorial error.

As argued above, defendant cannot show that the prosecutor committed flagrant misconduct as the challenged conduct was either not improper or not prejudicial. If defendant cannot make this showing then the Court should also reject the claim of ineffective assistance of counsel. ***State v. Thorgerson***, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

viii. Defense counsel was not ineffective.

All of the above arguments are made through the hindsight of appellate counsel. The record shows that defense counsel in this case was effective and was an adversarial opponent as contemplated in ***Cronic***. Prior to trial, it appears that defense counsel hired a private investigator. CP 74. It also appears from the record that defense counsel conducted pretrial interviews of the witnesses and victims to prepare for trial. *See e.g.*, V RP 470 (interviewed Mike Thomas), V RP 302 (interviewed Bill Campbell, IV RP 168 (interviewed K.C.-J.).

Defendant also had the opportunity to present a case to the jury where he was able to present his side of case. Defendant took the stand in his own defense. V RP 500 - VI RP 633. Defense called a witness on defendant's behalf. VI RP 636-644.

The record shows that defense counsel made motions in limine, made objections during trial, and otherwise acted appropriately as an effective defense counsel. Defendant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. The Court should uphold defendant's convictions.

b. No prejudice can be presumed to result from the defense counsel's trial decisions.

For a finding of ineffective assistance of counsel, the defendant must demonstrate prejudice. To demonstrate prejudice, the defendant must

show that the outcome of the trial would probably have been different if counsel had offered the instruction. ***State v. Brett***, 126 Wn.2d 136, 199, 892 P.2d 29 (1995). None of defendant's above arguments would clearly have changed the outcome of this trial.

As argued above, defense counsel likely would not have prevailed on his objection to K.C.-J.'s competency or child hearsay statements, so there is no prejudice in not making these objections. In addition, defense counsel's tactical decisions, even if wrong in hindsight, were not prejudicial. The bicycle incident described by K.C.-J., Carter's ER 609 convictions, and the failure to object to the discrepancy between J.C.'s testimony and her interview, were all minor decisions in the scheme of this trial. Defendant is mistaken about his claim of improper opinion evidence and prosecutorial error.

In this matter, the State and the defense presented their respective cases to the jury. The jury found that defendant was guilty beyond a reasonable doubt of the crimes of child molestation against J.C. and K.C.-J. Any of the alleged errors made by defense counsel would not have changed this finding as there was sufficient evidence to show that defendant molested these two girls.

Therefore, appellant has failed to show ineffective assistance of counsel. His convictions should be affirmed.

4. CUMULATIVE ERRORS IN THIS CASE DID NOT RESULT IN A FUNDAMENTALL UNFAIR TRIAL.

"In the last analysis, the final measure of error in a criminal case should be: Was the defendant afforded, not a perfect, but, rather, a fair trial? – for the constitution guarantees no one a perfect trial." ***State v. Green***, 71 Wn.2d 372, 373, 428 P.2d 540 (1967). The doctrine of cumulative error is limited to instance where there are several trial error that standing along may not be sufficient to justify reversal, but when combine may deny a defendant a fair trial. ***State v. Greiff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). A few errors that had little or no effect on the outcome of the trial does not deprive defendant of a fair trial. *Id.* The errors must produce a trial that is "fundamentally unfair." ***State v. Emery*** 174 Wn.2d 741, 767, 278 P.3d 653 (2012).

In this case, as in all trials, there were some errors. However, none of these errors resulted in the trial being fundamentally unfair. The Court should uphold defendant's four convictions for child molestation in the first degree.

D. CONCLUSION.

The Court should uphold the convictions as defendant had a fair trial. Defendant has not shown that the trial court committed error by finding K.C.-J. competent or admitting her out of court statements. The trial court properly admitted testimony from Detective Eggleston

regarding his interview of defendant. The prosecutor's questioning and argument were not improper or erroneous, and even if some were, defendant fails to show prejudice or that the no curative instruction would have cured the prejudice. Defense counsel was not ineffective in his tactical decisions and acted properly. The Court should affirm defendant's convictions in this case.

DATED: August 18, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/18/15
Date Signature

PIERCE COUNTY PROSECUTOR

August 18, 2015 - 1:31 PM

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